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May 15, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND DELIVERY
Magalie R. Salas, Esquire
Secretary
Federal Communications Commission
Room TW-B204
445 12th Street, S.W.
Washington, DC 20554

Re: Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)
GN Docket No. 01-74

Dear Ms. Salas:

Transmitted herewith on behalf of The WB Television Network are an original and four copies of the "Comments of the WB Television Network," filed in the above-referenced rulemaking proceeding.

Should any questions arise concerning this matter, please communicate directly with the undersigned.

Very truly yours,

DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP

Andrew S. Kersting
Counsel for
The WB Television Network

Enclosure
cc (w/ encl.): Certificate of Service (by hand)
Ms. Lisa Gaisford (by hand)
Mr. G. William Stafford (by hand)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Reallocation and Service Rules	)	GN Docket No. 01-74
for the 698-746 MHz Spectrum Band	)	
(Television Channels 52-59)	)	

To: The Commission

COMMENTS OF THE WB TELEVISION NETWORK

THE WB TELEVISION NETWORK

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May 15, 2001

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SUMMARY

In adopting new rules to reallocate the lower 700 MHz spectrum band for new commercial wireless services, The WB Television Network ("The WB") respectfully requests that the FCC consider the significant impact its new rules will have on the continued development of emerging broadcast television networks. Specifically, The WB requests that the FCC make every effort to ensure that its new rules will not further hinder or impede the prompt construction and on-air operation of new NTSC stations, the proposals for which have been pending before the FCC for nearly five (5) years. As demonstrated herein, the proposed new NTSC stations are critical to the ability of emerging new networks such as The WB to extend their nationwide coverage by affording them the opportunity to acquire additional primary affiliates in television markets in which they do not have an existing affiliation.

Due to the significant number of television stations already authorized to operate in the Channel 52-59 spectrum band, the proposed new NTSC stations would have, at most, a marginal impact upon the Commission's ability to clear the lower 700 MHz band prior to the end of the transition period. Therefore, the Commission should continue to process and grant pending proposals for new NTSC stations to operate on Channels 52-58 during the pendency of this rulemaking proceeding, so long as the proposed new NTSC stations would not cause interference to other television stations. Moreover, despite the Commission's effort to expedite the clearing of the lower 700 MHz band, it is becoming increasingly clear that the auction for this spectrum band will not be held until 2006. Thus, the Commission's interest in clearing the Channel 52-59 spectrum band is premature and its refusal to grant NTSC proposals which have been pending before the Commission for almost five years is unwarranted because there will not be any new

wireless licensees in the lower 700 MHz band until near the scheduled end of the transition period.

Furthermore, due to the substantial period of time in which the various NTSC proposals have been pending before the FCC, the Commission should make a concerted effort to expedite the processing of these proposals. The Commission also should (i) permit parties to amend their pending NTSC proposals to eliminate conflicts with other mutually exclusive proposals filed during the amendment filing window which closed on July 17, 2000; (ii) permit other minor curative amendments where an NTSC proponent can demonstrate that its pending NTSC proposal is in conflict with an application that either (i) was filed after July 17, 2000, or (ii) had not been entered into the FCC's data base as of July 17, 2000; (iii) permit all amended NTSC proposals to specify a digital operation on a DTV channel outside the core; and (iv) process waiver requests for short-spaced allotment proposals under the same interference criteria that is applied in the application context.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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Reallocation and Service Rules	)	GN Docket No. 01-74
for the 698-746 MHz Spectrum Band	)	
(Television Channels 52-59)	)	

To: The Commission

COMMENTS OF
THE WB TELEVISION NETWORK

The WB Television Network ("The WB"), by its attorneys, hereby submits these comments in response to the *Notice of Proposed Rule Making*, FCC 01-91 (released March 28, 2001) ("*NPRM*"), in the above-captioned proceeding. The WB respectfully submits that, as an emerging network, it can provide the Commission with a unique and important perspective concerning the issues raised in this proceeding. Accordingly, as the Commission adopts new rules to reallocate the 698-746 MHz spectrum band for new commercial services as part of the transition from analog to digital television, The WB respectfully requests that the Commission consider the significant impact its new rules will have on the development of emerging networks. Specifically, The WB requests that the Commission make every effort to ensure that its new rules will not hinder or impede the prompt construction and on-air operation of new NTSC stations which will provide The WB and other emerging networks with additional stations and markets in which to gain primary affiliations. Regardless of whether it is The WB or another new network that gains a new affiliate and thereby strengthens its competitive posture with respect to the four established networks, the prompt commencement of new service from additional broadcast

outlets and resulting network affiliations will further the significant public interest objective of encouraging the emergence of new national networks.

I. Introduction and Background.

The Commission has long espoused a commitment to foster the ability of new broadcast networks to enter and compete in the television marketplace.[1] Dating back to 1941, when the Commission adopted its Chain Broadcasting rules,[2] a primary goal of the Commission has been to remove barriers that inhibit the development of new networks. In adopting the Chain Broadcasting rules, the Commission explained that the rules were intended to "foster and strengthen broadcasting by opening up the field to competition" and encourage the development of new networks.[3]

Although the broadcast industry has changed dramatically since the Chain Broadcasting rules were adopted, the Commission's goal of removing barriers that would inhibit the development of new networks[4] is no less important today. Indeed, due to the paucity of unaffiliated television stations in many markets and the number of choices (including the four incumbent broadcast networks) that vie for viewers' attention, the challenge of launching a new broadcast network is even more daunting today. Today's

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[1] See *Report on Chain Broadcasting*, Commission Order No. 37, Docket 5060 (May 1941 at 88) ("*Report on Chain Broadcasting*"); *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, 25 FCC 2d 318, 333 (1970); *Fox Broadcasting Co. Request for Temporary Waiver of Certain Provisions of 47 C.F.R. §73.658*, 5 FCC Rcd 3211, 3211 and n.9 (1990), citing *Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation* (Vol. 1 Oct. 1980), *waiver extended*, 6 FCC Rcd 2622 (1991).

[2] *Report on Chain Broadcasting* at 88. The Chain Broadcasting rules originally were adopted for radio, but were applied to television in 1946. *Amendment of Part 3 of the Commission's Rules*, 11 Fed.Reg. 33 (Jan. 1, 1946).

[3] *Report on Chain Broadcasting* at 88.

[4] *See Revisions of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates*, 47 C.F.R. §73.658(a), (b), (d), (e) and (g), 10 FCC Rcd 11951, 11955 (1995).

new networks – including The WB, UPN, and PaxNet -- deserve the same chance that the earlier entrants were given to compete in the free over-the-air television market.

The WB was launched on January 11, 1995, with two hours of prime time programming per week, which was carried by 48 affiliated stations nationwide with an audience reach of 80 percent of U.S. television households.[5] By the end of the 1999-2000 broadcast year, The WB was broadcasting 13 hours of prime time programming on six nights, and was carried by approximately 68 primary affiliated full-power stations. As part of its regular 1999-2000 program schedule, The WB broadcasted 19 hours of children's programming each week, including programs designed to meet the educational and informational needs of children.

In attempting to establish itself as a viable competitor with the four major networks, the single most difficult impediment for The WB has been securing an affiliation with a sufficient number of television stations to gain and maintain sufficient nationwide coverage.[6] In some markets, The WB has experienced difficulty finding an available station with which to affiliate. In other markets, it has had difficulty finding stations with which to affiliate that have sufficiently powerful signals to provide adequate coverage of the market. Unlike the established networks, which have extensive distribution systems composed of powerful VHF stations, The WB network has only six primary VHF affiliates; the remaining 62 primary affiliations are with weaker UHF stations. The WB also has been forced to rely on low power stations or cable carriage in some markets. In other markets, The WB has

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[5] The 80 percent figure included The WB's cable carriage on Superstation WGN-TV, Channel 9, Chicago, Illinois. Without WGN-TV's carriage, The WB's over-the-air audience reach was 61 percent at launch. The WB is no longer carried by Superstation WGN-TV except in Chicago.

[6] The WB's national advertisers require coverage of at least 80 percent of the country.

had no alternative but to enter into secondary affiliations with stations that have a primary affiliation with another network.[7] Together, these difficulties have significantly hampered The WB's quest for nationwide reach.

Finding stations with which to affiliate has been particularly frustrating for The WB because it has no control over (or the ability to increase) the number of available television stations in a particular market. Almost two-thirds of all television markets have only four commercial TV stations. The WB is hampered by the fact that it is, at best, the fifth -- or in some cases the sixth -- entrant in a market. Fewer than 20 percent of all markets have six or more commercial stations. Even in those markets where there are six or more stations, that number of broadcast outlets does not necessarily ensure that one is available to affiliate with The WB. In addition to affiliating with ABC, CBS, NBC and Fox, incumbent stations in many markets frequently have existing affiliations with a home shopping or religious network, making them unavailable to new network entrants. This, in turn, makes it more difficult for The WB to effectively compete with the incumbent networks by providing the public with additional viewing options. In those few markets where a station is available for affiliation, the station generally is among the weaker stations in the market, or the station often is so far removed from the center of the market that its signal may cover only a small portion of the population within that market.

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[7] Secondary affiliations are The WB's least favorable alternative because the hallmark of a network is the ability to run its programming "in pattern," *i.e.*, in the order determined by the network, and simultaneously (within the same time zone) by all of its affiliated stations. As a secondary affiliate, The WB's programming is aired only when the affiliated station is not broadcasting the programming of its primary affiliate. The WB would never choose a secondary affiliation over a primary affiliation, even if the secondary affiliation is with a station with a stronger signal, so long as the primary affiliate is an operating full-power station.

The enormous task of launching a new network -- both financially and otherwise -- cannot be understated. Although The WB has been on the air for six years, it posted its first quarterly profit in the fourth quarter of 1999. The prognosis for The WB remains good, but it must be remembered that The WB lost $88 million in 1997 and lost $96 million in 1998.[8] Similarly, UPN reportedly has lost $180 million a year, and Paxson reportedly lost $33.7 million during the first quarter of this year.[9]

The establishment of a new network is hinged in large measure upon the life blood of any national network -- its primary affiliates. Accordingly, in July 1996, a series of WB-related applications and allotment rulemaking petitions were filed with the FCC which, together, cover many of the top 100 television markets in which there were no full-power stations available to affiliate with The WB (or any other emerging network) on a primary basis. At the time these applications and rulemaking petitions were filed, each of the respective applicants/petitioners had an existing relationship with The WB. There was no commitment on the part of either the various applicants/petitioners or The WB to enter into an affiliation agreement with respect to the proposed new NTSC stations. The WB indicated its willingness, however, to enter into affiliation agreements with the applicants/petitioners in their respective proposed communities in the event they were ultimately successful in obtaining a station license.

Collectively, the WB-related applicants filed 20 applications for new NTSC stations in July 1996, 11 of which proposed to bring a first local service to the designated community. The WB-related parties also filed 21 allotment rulemaking petitions for new

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[8] *UPN, WB 1998 Losses Widen*, Television Digest, April 12, 1999. The WB lost $24 million during the third quarter of 1999 alone, which was an increase from $17 million during the same period during 1998. *Notebook*, Television Digest, October 18, 1999.

[9] *Electronic Media*, May 8, 2000; *Communications Daily*, April 27, 2001.

NTSC stations. All of these rulemaking petitions were filed prior to the July 25, 1996, deadline for filing such petitions,[10] and each proposed to bring a first local television service to the designated community.[11] These applications and rulemaking petitions have been awaiting processing by the FCC for almost five (5) years. To allow the dismissal of these NTSC proposals at this time would be extremely harmful to The WB's effort to extend its nationwide reach and would be clearly unfair.

If The WB and other emerging networks are to fully compete, head-to-head, with the four established networks, they must be allowed to compete for affiliates in those markets in which they currently do not have one. In order to promote the efforts of The WB and other emerging networks, The WB requests that, in adopting rules to reallocate the 698-746 MHz spectrum band, the Commission consider the significant impact that its new rules will have on emerging networks such as The WB, UPN, and PaxNet. Specifically, The WB requests that the Commission make every effort to ensure that its new rules will not hinder or impede the prompt construction and on-air operation of new NTSC stations, which will provide The WB and other emerging networks with additional stations and markets in which to gain primary affiliations. Indeed, regardless of whether it is The WB or another new network that gains an affiliate in a particular market, and thereby strengthens its effort to obtain a competitive stronghold with the four established networks, the prompt commencement of new service from additional broadcast outlets and resulting

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[10] *See Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, MM Docket No. 87-268, *Sixth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 14588, 14635-36 ¶105 (1997) ("*Sixth Report and Order*").

[11] The WB-related parties also filed accompanying construction permit applications for each of their allotment petitions. Each of these applications was filed well before the September 20, 1996, deadline for filing NTSC applications. *See Sixth Report and Order*, 12 FCC Rcd at 14635 ¶104, n. 173.

network affiliations will further the significant public interest objective of encouraging the emergence of new national networks in accordance with the Chain Broadcasting rules.

II. The FCC Should Continue to Process and Grant Pending NTSC Proposals for Channels 52-58 During the Pendency of This Rulemaking Proceeding.

In the *NPRM*, the Commission acknowledged its previous statements that "it would not summarily terminate the pending applications and rulemaking petitions" for new NTSC stations, but would, "at a later date, provide the applicants and petitioners an opportunity to amend their applications and petitions, if possible, to a channel below Channel 60."[12] The Commission recognized that continuing to process these applications could result in greater incumbency on the lower 700 MHz band, "which may make new service operations more difficult."[13] Nevertheless, the Commission stated:

> . . . [W]hile we do not direct the Mass Media Bureau to suspend processing of applications (with the exception of stations on Channel 59) for new analog stations, we seek comment on our ultimate treatment of the remaining pending applications. (*NPRM* at ¶24).

The Commission further stated that "[a]ny grant made during the pendency of this proceeding will, however, be conditioned upon the outcome of this proceeding." *Id.* at n.64.

Based on informal conversations with the FCC's staff, The WB understands that, although the staff will continue to "process" pending NTSC proposals for Channels 52-58 during the pendency of this rulemaking proceeding, they will not *grant* these proposals

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[12] *NPRM* at ¶23, citing *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, MM Docket No. 87-268, *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, 14 FCC Rcd 1348, 1367-69 ¶¶40, 42, 45 (1998) ("*Second MO&O*"); *Reallocation of Television Channels 60-69, the 746-806 MHz Band*, ET Docket No. 97-157, *Report and Order*, 12 FCC Rcd 22953, 22971-72, ¶40 (1998) ("*Upper 700 MHz Reallocation Order*").

[13] *NPRM* at ¶24.

until after this proceeding has concluded. The WB believes that this course of action is inconsistent with the full Commission's express directive in the *NPRM* concerning Channel 52-58 proposals and is unlawful. Indeed, the Administrative Procedure Act ("APA") prohibits agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A) (1994). Agencies are required to examine the relevant data and articulate a satisfactory explanation for their actions. Where an agency fails to provide a reasoned explanation, or where the record belies the agency's conclusion, a reviewing court will reverse the agency's action.[14]

In this case, if the Commission did not intend for its staff to process *and grant* pending NTSC proposals for Channels 52-58 during the pendency of this rulemaking proceeding, the Commission was required to make this clear in the *NPRM*. The Commission cannot, consistent with the APA, expressly state in the *NPRM* that (i) it will continue to "process" pending NTSC proposals for Channels 52-58; (ii) any grants made during the pendency of this proceeding will be conditioned upon the outcome of the proceeding; and (iii) at the same time, informally direct its staff not to grant any such proposals without providing a reasoned explanation for its action. Indeed, the *NPRM* does not contain any language precluding the staff from granting pending NTSC proposals during the pendency of this proceeding.[15] Moreover, the apparent distinction between "process" and "grant" is a procedural nicety that is not likely to survive judicial scrutiny.

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[14] *See generally Bellsouth Corporation v. FCC*, 162 F.3d 1215, 1221 (D.C. Cir. 1999), citing *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

[15] The Commission's language concerning the processing of Channel 52-58 proposals is in sharp contrast to its explicit direction concerning the processing of Channel 59 proposals: ". . . [F]or the pendency of this rulemaking proceeding, we direct the Mass Media Bureau to suspend processing of applications and channel allotment petitions for new analog stations on Channel 59, but to allow limited amendments to specify another channel, if available." *NPRM* at ¶24.

Therefore, The WB respectfully submits that, in accordance with the express language in the *NPRM*, the full Commission should immediately direct its staff to process and grant the pending NTSC proposals for Channels 52-58.

III. The Pending NTSC Proposals For Channels 52-58 Will Have Only a Marginal Impact on the Clearing of the Lower 700 MHz Band and the Provision of New Wireless Services.

As noted in the *NPRM*, there currently are 101 authorized NTSC stations in the lower 700 MHz band, and 165 authorized DTV stations, pending applications and allotment rulemaking petitions for DTV stations in this band. Thus, there currently are a total of 266 potential authorized stations in the 700 MHz band without considering the pending proposals for new NTSC stations. *See NPRM* at ¶28 (table).

The *NPRM* also notes that there are approximately 57 requests for new NTSC stations in the Channel 52-59 spectrum band, including both applications and allotment rulemaking petitions. *Id.* at ¶23. Many of the pending proposals for new NTSC stations cannot be granted, however, for a variety of reasons.[16] If it were to be assumed that no more than 80% of the pending NTSC proposals could be granted,[17] this would reduce the number of pending proposals for new NTSC stations in this band to approximately 46 new stations. If all of the pending requests for DTV allotments and applications in the lower

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[16] For example, there currently are pending mutually exclusive allotment petitions for Charleston, West Virginia, Ashland, Kentucky, and Fairmont, West Virginia, all of which seek the allotment of Channel 55 to the respective community. Due to the shortage of available channels in this area, it appears that only one of these three proposals can be granted. There also are mutually exclusive allotment proposals on file for Plaquemine and Hammond, Louisiana, both of which seek the allotment of Channel 57. In addition, on April 24, 2001, Oshkosh 22, L.L.C. requested the dismissal of its pending rulemaking petition seeking the allotment of Channel 50 at Oshkosh, Wisconsin.

[17] The 80% figure is a conservative estimate. Based on The WB's discussions with the FCC's staff, it is doubtful that more than 50% of the pending requests for new NTSC stations will be granted, including those specifying Channels 52-59.

700 MHz band were granted, the pending NTSC proposals would increase the total number of authorized stations from 266 to 312. Thus, even assuming, *arguendo*, that 80% of the pending NTSC proposals were to be granted, the pending NTSC proposals would constitute *less than 15%* of the total authorized stations in the lower 700 MHz band. As stated above, the 80% figure is extremely conservative. Therefore, the actual number of new NTSC stations that might be authorized would be substantially less than 15% of the total authorized stations in this band.

Moreover, as the Commission noted, the lower 700 MHz band is significantly more congested than the Channel 60-69 spectrum band.[18] Due to the significant number of DTV assignments in the lower 700 MHz band, it will be much more difficult to clear and far more difficult for new services to operate in this band prior to the end of the transition period, particularly in larger metropolitan markets. *NPRM* at ¶26. Therefore, as the Commission recognized, "given the significant number of analog and DTV incumbents that already exist in this band" (*NPRM* at ¶24), the pending NTSC proposals will have, at most, only a marginal impact on the proposed new services and the ability to clear the Channel 52-59 spectrum band prior to the end of the transition period.

Furthermore, in the upper 700 MHz proceeding, the FCC stated that it would permit stations operating on Channels 60-69 to relocate into Channels 52-59 on temporary basis.[19] Stations operating on Channels 60-69 have always been able to file a rulemaking petition to vacate the upper 700 MHz band prior to the end of the transition

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[18] Although there are approximately the same number of analog allotments in the upper and lower 700 MHz bands, there are only 20 DTV allotments in the upper 700 MHz band and 165 digital assignments on Channels 52-59. *NPRM* at ¶26.

[19] *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, FCC 01-25, ¶36 (released January 23, 2001) ("*Upper 700 MHz Third Report and Order*").

period.[20] It would be grossly inequitable for the Commission to permit Channel 60-69 stations to relocate into the lower 700 MHz band at this late date, and, at the same time, refuse to grant proposals for new NTSC stations in that band which have been pending before the Commission since at least September 1996.[21]

In addition, although the FCC has placed an increased emphasis on clearing both the upper and lower 700 MHz bands in order to facilitate the provision of new wireless services, the Commission's effort to expedite the clearing of the lower 700 MHz band is inconsistent with the timetable the Commission proposed for requiring new service licensees to provide "substantial service" in that band. At paragraph 104 of *NPRM*, the FCC proposed to require new licensees to provide "substantial service" as of January 1, 2015, which is eight years after the scheduled end of the transition period.[22] Because any new NTSC stations authorized on Channels 52-58 must terminate their operation at the end of the transition period, it is doubtful that they could have any significant effect on the implementation of new services if the new licensees are not required to provide "substantial service" until eight years later.

Finally, the *NPRM* reflects a misunderstanding as to when new service licensees could actually begin operating in the lower 700 MHz band. The Commission stated:

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[20] *See Public Notice*, 14 FCC Rcd 19559, n. 1 (1999) ("Mass Media Bureau Announces Window Filing Opportunity for Certain Pending Applications and Allotment Petitions or New Analog TV Stations") ("*Window Filing Notice*"), citing *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, MM Docket No. 87-268, *Sixth Further Notice of Proposed Rule Making*, 11 FCC Rcd 10968, 10992 (1996) ("*Sixth Further Notice*").

[21] As stated above, the deadline for filing applications for new NTSC stations was September 20, 1996. *See Sixth Report and Order*, 12 FCC Rcd at 14588, ¶104, n. 173.

[22] January 1, 2015, is the same date that the FCC will require licensees in the upper 700 MHz band to provide substantial service. *See NPRM* at ¶104; *Upper 700 MHz Errata*, DA 00-450 (released March 1, 2000).

> This band was originally intended to remain principally a television band until the end of the transition and we recognize that it may be inequitable not to process these applications, or a subset of them.

NPRM at ¶24 (footnote omitted). The Commission's effort to expedite the clearing of the lower 700 MHz band apparently is based on the belief that the FCC will be able to derive more revenue during the auction for this spectrum if there is greater certainty concerning when the spectrum will be available for new services.

Despite the suggestion in the *NPRM* that there has been some change concerning the use of the lower 700 MHz band, pursuant to Section 309(j) of the Communications Act, broadcasters are not required to vacate this spectrum until the end of the transition period.[23] Thus, there has been no change in Congressional intent with respect to the lower 700 MHz band remaining a "principally a television band until the end of the transition" period. Furthermore, a budget comprise was reached earlier this month between the Senate, House of Representatives, and the White House that would delay the auctions for the upper and lower 700 MHz bands until 2004 and 2006, respectively.[24] In light of the Bush Administration's budget proposals, the auction for the lower 700 MHz band is not likely to be held until near the end of scheduled transition period. Therefore, the Commission's interest in expediting the clearing of the lower 700 MHz band is misplaced because there will be no new service licensees in this band until the end of the transition period.

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23 47 U.S.C. §309(j)(14)(A).

24 *See Broadcasting & Cable*, p. 9 (May 7, 2001).

IV. Amended NTSC Proposals Which Propose a Digital Operation on Channel 59 Should Be Accepted So Long as They Will Not Cause Interference to New Services.

In the NPRM, the Commission stated: "With regard to applications pending for stations on Channel 59, we believe that granting more *analog* station licenses could impact the licensing of new services in the Upper 700 MHz Band due to adjacent channel interference problems."[25] The Commission provided no evidence, however, in either the *NPRM* or the cited orders that stations operating on Channel 59 -- either analog or digital -- would cause interference to new licensees in the upper 700 MHz band. In the *Upper 700 MHz First Report and Order*, the Commission merely stated:

> Licensees operating on spectrum between 747 MHz and 752 MHz (Channel 60), in addition to providing co-channel protection to Channel 60 television stations, will have to provide adjacent channel protection to television stations operating on both Channel 61 and 59.

15 FCC Rcd at 532-33, ¶141 (footnote omitted). Similarly, in the *MO&O and FNPRM* in the same proceeding, the Commission stated, "[o]ur rules specifically require new licensees to provide adjacent channel protection to broadcasters on Channel 59, as well as protection to Channels 60-69."[26]

There currently are seven licensed analog stations operating on Channel 59. In addition, there is a digital-only station operating on a Channel 59 analog allotment at

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[25] *NPRM* at ¶24 (emphasis added), citing *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, WT Docket No. 99-168, *First Report and Order*, 15 FCC Rcd 476, 532-33, ¶141 (2000) ("*Upper 700 MHz First Report and Order*"); *see also Upper 700 MHz Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, FCC 00-224, ¶57, n. 111 (released June 30, 2000) ("*Upper 700 MHz MO&O and FNPRM*").

[26] *Upper 700 MHz MO&O and FNPRM*, ¶57, n. 111, citing *Upper 700 MHz First Report and Order*, 15 FCC Rcd at 532-33, ¶141.

Stuart, Florida.[27] There also are 20 DTV allotments on Channel 59. *See* 47 C.F.R. §73.622(b). Thus, there soon will be a total of 28 stations operating on Channel 59. According to the FCC's website, there are only nine pending NTSC proposals to operate on Channel 59.[28] In light of the significant number of stations already authorized to operate on Channel 59, any amended NTSC proposals to specify a digital operation on Channel 59 would have only a marginal impact on the proposed new services in the upper 700 MHz band because they would effect, at most, only nine markets.

As stated above, the FCC has not provided a reasoned analysis demonstrating that stations operating on Channel 59 will necessarily cause interference to new licensees in the upper 700 MHz band. Indeed, through the use of constant impedance mask filters, many broadcasters operating on Channels 14 and 69 who have employed extensive filtering have not caused any interference to adjacent land mobile licensees. The Commission's conclusory statement that Channel 59 suddenly is unavailable for NTSC proponents is unwarranted, and has even less merit with respect to digital operations on Channel 59. Therefore, those parties with pending Channel 59 NTSC proposals should be permitted to amend their respective proposals to specify a digital operation on Channel 59 so long as they demonstrate that the proposed digital operation will not cause harmful interference to new services operating in the upper 700 MHz band. The option to specify a digital operation on Channel 59 should be in addition to, and not in lieu of, the opportunity to file an amendment specifying an alternative channel if one is available. *See NPRM* at ¶24.

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[27] *See WHDT-DT, Channel 59, Stuart, Florida*, FCC 01-23 (released January 23, 2001).

[28] One of these is an amended NTSC proposal which seeks a Channel 59 DTV allotment at Bartlett, Tennessee.

V. To the Extent Necessary, All NTSC Proponents Should Be Permitted to Amend Their Pending Proposal to Specify a Digital Operation on Channels Outside the Core, Regardless of Whether Their Original Proposal Was an Application or an Allotment Rulemaking Petition.

In the *NPRM*, the Commission recognized that those persons with pending applications and/or rulemaking petitions proposing new NTSC stations have invested time, money, and effort in their applications and petitions. The Commission also acknowledged its previous statements in other proceedings that it would not summarily terminate the pending applications and rulemaking petitions, but, at a later date, would provide applicants and petitioners with an opportunity to amend their proposals, if possible, to specify a channel below Channel 60.[29]

The Commission provided NTSC proponents with an opportunity to modify their respective proposals to eliminate technical conflicts with DTV stations and move from Channels 60-69 through the *Window Filing Notice*.[30] In interpreting the *Window Filing Notice*, the Commission's staff has drawn a distinction between certain pending NTSC proposals with respect to the ability to propose a digital channel outside the core. For those pending applications for existing allotments, the staff will permit the applicant to propose a digital operation on the existing analog allotment, regardless of whether the channel is inside the core (*e.g.*, Station WHDT-TV, Stuart, Florida). Similarly, for rulemaking petitions seeking to change an existing analog allotment, the staff will permit the petitioner to propose a new digital allotment outside the core. However, for those

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[29] *NPRM* at ¶23, citing *Window Filing Notice*, 14 FCC Rcd 19559; *Second MO&O*, 14 FCC Rcd at 1367-68, 1369 ¶¶40-42, 45; *Upper 700 MHz Reallocation Order*, 12 FCC Rcd at 22971-72 ¶40.

[30] The amendment filing period opened on November 22, 1999, and closed on July 17, 2000. *See Public Notice*, 15 FCC Rcd 4974 (2000) ("Window Filing Period for Certain Pending Applications and Allotment Petitions for New Analog TV Stations Extended to July 15, 2000").

parties who filed a rulemaking petition prior to July 25, 1996, seeking a new analog allotment and modified their proposal during the amendment window to propose a digital allotment, the Commission's staff has informally advised that it will require the channel to be inside the core (*i.e.*, between channels 2-51). As demonstrated below, the staff's interpretation of the *Window Filing Notice* is inconsistent with the full Commission's orders in the Upper 700 MHz and DTV proceedings.

The relevant portion of the *Window Filing Notice* states as follows:

> Petitions for rule making to specify a new channel or amendments of petitions
>
> * * * *
>
> *Rulemaking petitions or amendments to pending petitions* must retain the community of license specified in the pending television application or rulemaking petition.
>
> *Such petitions for rule making* filed during this window by freeze-area applicants on channels below 60 must also demonstrate that interference to a DTV station . . . would be caused if the requested channel change is not made.
>
> *Such a petition* may request a DTV channel as the replacement for the NTSC channel allotment, as the Commission indicated in paragraph 42 of the *Second MO&O*. *A petition seeking a DTV allotment under these circumstances will be evaluated under the criteria for changing an initial DTV allotment set forth in Section 73.622(a) of the rules.* Specifically, the channel may be in the range from 2 to 59, and DTV and NTSC stations must be protected by meeting the engineering criteria of Section 73.623(c) of the rules.

14 FCC Rcd at 19562-63 (emphasis added).

The references to "such petitions for rulemaking" and "such a petition" in the second and third paragraphs above refer directly to the first sentence concerning both rulemaking petitions to change an existing allotment and amendments to pending rulemaking petitions. With respect to amending a pending NTSC proposal to propose a digital allotment, the *Window Filing Notice* makes no distinction between rulemaking

petitions seeking to change an existing allotment and petitions requesting a new allotment. Indeed, the statement that "[s]uch a petition may request a DTV channel as the replacement for the NTSC channel allotment" applies to both the replacement of an existing allotment and an NTSC allotment proposed in a pending rulemaking petition. Therefore, the staff's distinction between certain NTSC proponents with respect to their ability to propose digital channels outside the core is not supported by the express language of the *Window Filing Notice*.

Furthermore, although the *Window Filing Notice* cites to paragraph 42 of the *Second MO&O* in the DTV proceeding, that citation also does not support the staff's interpretation. In the *Second MO&O*, the Commission addressed several reconsideration petitions which alleged that, in making the various DTV assignments, the Commission failed to protect the parties' pending applications and allotment rulemaking petitions for new NTSC stations which were located in freeze zones.[31] At least two of the reconsideration petitions addressed by the Commission involved pending rulemaking proposals for new NTSC allotments.[32] In addressing these reconsideration petitions, the Commission stated that it did not intend to protect proposals for new NTSC stations that were within freeze areas. *Second MO&O*, 14 FCC Rcd at 1366, ¶38. Nevertheless, the

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[31] *See* 14 FCC Rcd at 1365 ¶37, n. 53 (referencing seven petitions for reconsideration).

[32] *See Id.*, referencing Petition for Reconsideration, filed April 20, 1998, by Fant Broadcast Development, L.L.C., regarding its Petition for Rulemaking, filed July 23, 1996, requesting the allotment of Channel 49 to New Albany, Indiana; Petition for Reconsideration, filed April 20, 1998, by Pappas Telecasting of America, A California Limited Partnership, regarding its Petition for Rulemaking, filed July 22, 1996, requesting the allotment of Channel 38 to Vergennes, Vermont. Both of these reconsideration petitions requested a change in the DTV Table of Allotments in order to protect their respective rulemaking petitions, which would provide the communities of New Albany and Vergennes with their first local television service.

Commission adopted the petitioners' suggestion, stating that it would permit parties whose NTSC "applications" conflict with DTV stations to request a change in the NTSC channel or to amend their application to eliminate such conflicts. *Id.* at 1367, ¶40. Accordingly, the Commission directed its staff to establish a window filing period for such amendments which culminated in the *Window Filing Notice*. *Id.* at ¶¶41-42. Throughout the Commission's entire discussion addressing the reconsideration petitions and the amendment filing period, the Commission made no reference to pending "rulemaking petitions," but, instead, referred to the pending NTSC proposals generally as "applications."[33] The Commission even referred to the pending applications and rulemaking petitions interchangeably.[34]

In light of the context in which the full Commission addressed the reconsideration petitions and pending NTSC proposals in the *Second MO&O*, the Commission's short-hand means of referring to the pending NTSC proposals as "applications" can only be interpreted to include pending rulemaking petitions. To

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[33] *See* 14 FCC Rcd at 1365-68, ¶¶37-42. The Commission made similar statements in the *NPRM* in this proceeding. In eliciting comments concerning "whether there are stronger equities for continuing to process any particular subcategory of these pending *applications*" (*NPRM* at ¶24, emphasis added; footnote omitted), the Commission stated:

> These *NTSC stations* could also initially operate as digital stations or convert to DTV service during the transition. In either case, the Commission would need to identify in-core relocation channels for their continued operation with DTV service after the transition.

Id. at n. 64 (emphasis added). Once again, although referring generally to pending "applications" and "NTSC stations," the Commission did not state that pending rulemaking petitions for new NTSC stations could not be amended to propose a digital operation on Channels 52-58.

[34] The Commission stated: "In fact, in the *Allotment Reconsideration Order*, [we] specifically indicated that we did not protect NTSC applications where they were for stations in areas where we had indicated we would not accept new *petitions*." 14 FCC Rcd at 1366, ¶38 (emphasis added).

construe the language in any other manner would be inconsistent with the Commission's statement concerning its proposed treatment of pending NTSC proposals in the *Upper 700 MHz Reallocation Order*. After noting that it had provided a final opportunity for the filing of applications for new NTSC stations and rulemaking petitions to add new analog channels in the *Sixth Further Notice* in the DTV proceeding, the Commission stated that it did not "wish to summarily terminate the pending applications and rule making petitions, and we will at a later date provide applicants and petitioners an opportunity to amend their applications and petitions, if possible, to seek a channel below channel 60."[35] Nowhere in the *Upper 700 MHz Reallocation Order* or the DTV proceeding did the Commission ever state that allotment rulemaking petitions, as opposed to rulemaking petitions associated with a pending application to change an existing allotment, could not propose a digital operation on a channel outside the core. Therefore, because the staff's interpretation of the *Window Filing Notice* is not supported by the text of that *Notice* or any related Commission rulemaking order, the Commission should permit all NTSC proponents to seek a digital allotment outside the core regardless of whether their initial proposal was an application or an allotment rulemaking petition.

VI. The FCC Should Permit Parties to Amend Their Pending NTSC Proposals to Eliminate Conflicts with Mutually Exclusive Proposals Filed During the July 17, 2000, Filing Window and Permit Other Minor Curative Amendments.

Due to the shortage of available channels in many markets, there are some parties who filed petitions for rulemaking or amendments to pending rulemaking petitions prior to July 17, 2000, which became mutually exclusive with one another. Two examples of such situations are the pending rulemaking petitions seeking (i) the allotment of

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35 *Upper 700 MHz Reallocation Order*, 12 FCC Rcd at 22971.

Channel 55 at Charleston, West Virginia, Ashland, Kentucky, and Fairmont, West Virginia; and (ii) the allotment of Channel 57 at Plaquemine and Hammond, Louisiana. Both of these mutually exclusive situations arose as a result of the July 17, 2000, filing window.

Where there are mutually exclusive NTSC (or DTV) proposals pending before the FCC, the Commission is likely to resolve the conflicting proposals by initiating an allotment rulemaking proceeding in which it will treat the competing proposals as counterproposals. This type of contested allotment rulemaking proceeding would result in considerable delay in the commencement of a new television service. It would be much more efficient for all parties concerned (*i.e.*, the FCC, the mutually exclusive NTSC proponents, and the residents of the proposed service area) if the FCC were to open a limited filing window to provide these parties with an opportunity to amend their proposals and attempt to resolve conflicts between their mutually exclusive proposals which arose as a result of the July 17, 2000, filing window. This limited filing window should be open only to those parties who modified their pending NTSC proposal during the amendment filing window which closed on July 17, 2000, and, as a result, are now mutually exclusive with another amended NTSC (or DTV) proposal filed during the same window.

In addition to this limited filing opportunity, the FCC should permit those parties who modified their pending NTSC proposal during the July 17, 2000, filing window to submit minor curative amendments to their respective proposals which are now in conflict with a DTV, NTSC, or Class A application that either (i) was filed after July 17, 2000, or (ii) had not been entered into the FCC's data base as of the close of the filing window. Indeed, the Commission should not dismiss a pending NTSC proposal that either was acceptable for filing as of July 17, 2000, or has subsequently been found to be in conflict with a pending application which had not been entered in the FCC's data base

until after the close of the filing window. As demonstrated in greater detail below, many of the pending NTSC proposals will bring substantial public interest benefits to their proposed service areas, including the following: (i) promote the objectives of Section 307(b) of the Communications Act by bringing a first local service to the proposed community of license; (ii) bring a new network service to a substantial number of people in the proposed service area; (iii) foster competition among national networks; (iv) promote competition in the local advertising market; (v) increase viewpoint diversity in the television market; and (vi) provide an opportunity for new entry into the television broadcast industry. Therefore, the Commission should permit parties to file minor curative amendments to their respective NTSC proposals so long as they satisfy the requirements set forth above.

VII. The FCC Should Expedite the Processing of Pending Proposals for New NTSC Stations.

The pending NTSC proposals were all filed prior to either July 25 or September 20, 1996.[36] Thus, regardless of whether the pending proposal involves an application, rulemaking petition, or amended rulemaking petition, the proposal has been pending before the Commission for nearly five (5) years. These NTSC proposals have had to await the conclusion of the DTV proceeding, the enactment and implementation of the Community Broadcasters Protection Act, and are now subject to the instant rulemaking proceeding. As a result of the lengthy delay in the processing of these proposals, there now are only slightly more than five and one-half years before the scheduled end of the transition period. In light of the substantial period of time in which these proposals have been pending before the FCC, and because the vast majority of the pending NTSC

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[36] *See Sixth Further Notice*, 11 FCC Rcd at 10992-93.

proposals must be subject to competing applications and a competitive bidding process, the FCC should make every effort to expedite the processing of these pending NTSC proposals so that the proposed new NTSC stations can operate for a meaningful period of time before the scheduled end of the transition period.

Accordingly, The WB requests that the FCC process the pending NTSC proposals in the following manner:

1. In accordance with the Commission's express directive in the *NPRM*, continue to process *and grant* NTSC proposals for Channels 52-58 during the pendency of this proceeding.

2. Promptly establish a second, limited filing opportunity for those parties who modified their proposals during the previous filing window which closed on July 17, 2000, and which are now mutually exclusive with a proposal filed during the same window.

3. Act on all pending NTSC proposals within 90 days of the close of the limited filing opportunity either by accepting the applications for filing or commencing an allotment rulemaking proceeding proposing the allotment of the new channel. For those applications which are accepted for filing, the FCC should issue a public notice within 90 days of the close of the limited filing window which invites the acceptance of competing applications. The FCC should then hold a public auction for the new NTSC stations as soon as practicable, but in no event later than 180 days after the issuance of the public notice inviting additional competing applications. For those allotment proceedings which are uncontested and result in the allotment of a new channel, the FCC should issue a public notice within 30 days of the date the new allotment becomes final which opens a filing window for applications for the new allotment. The FCC should then hold a public

auction for the new NTSC stations no later than 180 days after the issuance of a Report and Order allotting the new channel.

For those pending applications and/or rulemaking petitions which involve a settlement proposal and are not subject to additional competing applications, the FCC should act on the pending settlement proposal no later than 60 days after the close of limited filing opportunity.

VIII. The FCC Should Process Waiver Requests for Short-Spaced NTSC Allotment Proposals Under the Same Criteria that is Applied In the Application Context.

A. The FCC's Policy Prohibiting Short-Spaced Allotments Should Not Be Applied to the Pending NTSC Proposals.

The FCC has a long history of prohibiting short-spaced allotments. The Commission's strict adherence to a fully-spaced allotment scheme is based on its well-established policy of "preserving the integrity of the Table of Allotments and the mileage separation criteria upon which the Table is based."[37] Although the Commission has granted short-spaced allotments in rare cases involving highly unusual circumstances,[38] the Commission has explained that "[s]trict adherence to the spacing requirements reflected in the Table is 'necessary . . . in order to provide a consistent, reliable and efficient scheme of [allotments].'"[39] In applying this principle, the Commission has consistently required that

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[37] *Chester and Wedgefield, South Carolina*, 5 FCC Rcd 5572 (1990).

[38] *See, e.g., Petition for Rule Making to Amend Television Table of Assignments to Add New VHF Stations in the Top 100 Markets and to Assure that the New Stations Maximize Diversity of Ownership, Control and Programming*, BC Docket No. 20418, *Report and Order*, 81 FCC 2d 233 (1980) ("*VHF Top 100 Markets*"), *recon. denied*, 90 FCC 2d 160 (1982), *aff'd sub nom. Springfield Television of Utah, Inc. v. FCC*, 710 F.2d 620 (10th Cir. 1983).

[39] *In the Matter of Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations (Pueblo, Colorado)*, *Report and Order*, 10 FCC Rcd 7662, 7667 (1999) (quoting *Chester and Wedgefield, South Carolina*, 5 FCC Rcd at 5572), *vacated and remanded on other grounds, Sangre de Cristo Communications, Inc. v. FCC*, 139 F.3d 953 (D.C. Cir. 1998), *affirmed on remand*, 16 Comm. Reg. (P&F) 610 (1999) ("*Pueblo, Colorado*").

the public interest benefits of a proposed short-spaced allotment outweigh the public interest benefit of maintaining the minimum spacing rules.[40] Where the proponent of a new allotment fails to demonstrate a compelling need for departing from the established distance separation standards, the Commission will not grant a waiver of the minimum spacing rules for allotment purposes. *Id.*

Nevertheless, the FCC's longstanding rationale for prohibiting short-spaced allotments – preserving the integrity of the NTSC Table of Allotments – has little, if any, relevance in this context in which the licensing of NTSC stations comes to an end. The pending NTSC proposals represent what will be the last of analog television stations. The Commission's interest in preserving the integrity of the NTSC Table has substantially less significance in this narrow context because the pending NTSC rulemaking petitions represent the last analog allotment proposals that the Commission will ever process.

Furthermore, the "integrity" of the NTSC Table of Allotments has been completely eviscerated by the paired digital allotments, which violate the distance separation requirements to a substantial degree. In electing to assign a paired DTV channel to all eligible NTSC stations, the Commission made the conscious decision to forfeit the "integrity" of the NTSC Table by creating many substantial co- and adjacent-channel short-spacings between NTSC and DTV allotments. The Commission was forced to forego the minimum distance separations requirements and base its digital allotment scheme primarily on interference criteria. Therefore, the Commission's policy of attempting to preserve the integrity of the NTSC Table no longer can serve as the basis for prohibiting short-spaced allotments because the "integrity" of the Table no longer exists.

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[40] *See Pueblo, Colorado*, 10 FCC Rcd at 7667, citing *London, Kentucky*, 7 FCC Rcd at 5937.

Indeed, at this final stage in the licensing of new NTSC stations, the FCC's overriding concern should be one of interference, rather than attempting to preserve the interstation separation standards which were effectively destroyed by the DTV Table of Allotments.

B. The FCC Must Give Short-Spaced Waiver Requests the Requisite "Hard Look."

It is well established that the Commission is "required to give waiver requests a 'hard look' and may not treat well-pleaded waiver requests in a perfunctory manner."[41] Indeed, as the D.C. Circuit has made clear:

> . . . [A] general rule, deemed valid because its overall objectives are in the public interest, may not be in the "public interest" if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.

WAIT Radio, 418 F.2d at 1157.

The WB respectfully submits that in considering the pending proposals for new NTSC stations on Channels 52-58 and the accompanying requests for waivers of the spacing requirements, the Commission must look beyond its general policy regarding short-spaced allotments. Specifically, the Commission must determine whether the rationale underlying that policy would be undermined in light of the substantial and broad-reaching public interest benefits that would result from a waiver of its spacing rules, especially considering the unique and extremely limited context in which these waiver requests are presented. Because the pending proposals for new NTSC stations represent the last analog television stations, and the distance separation requirements upon which the NTSC Table of Allotments was based have been substantially undermined by the paired

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[41] *VHF Top 100 Markets*, 90 FCC 2d 160, 166 (1982) (reconsideration order), citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

digital allotments, the Commission should grant waiver requests for short-spaced allotments to the same extent that it would grant short-spacing waiver requests in the application context, provided that the rulemaking proponent establishes that (i) the proposed allotment reference point represents an available transmitter site, and (ii) the proposed station will not cause interference to any other television station.[42]

Of the ten NTSC proposals filed by the WB-related applicants/rulemaking petitioners that currently remain pending for Channels 52-58, eight (8) involve a short-spaced allotment request. The substantial public interest benefits that would result from these allotment proposals are the same public interest benefits which the Commission sought to achieve in the *Interim Policy on VHF Television Channel Assignments* and *VHF Top 100 Markets.*[43] Indeed, the pending rulemaking petitions and accompanying requests for waiver of the Commission's distance separation requirements would provide the same, if not greater, public interest benefits than the Commission previously found sufficient to justify a waiver of its distance separation requirements. Seven of the pending Channel 52-58 NTSC proposals of the WB-related petitioners would provide the designated

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[42] In recent years, the Commission has demonstrated an increased willingness to grant short-spacing waivers in the application context where a grant of the requested waiver would not result in interference to other television stations and would provide substantial public benefits. *See, e.g., KRCA License Corp.*, 15 FCC Rcd 1794 (1999) (granted waiver requests for three Los Angeles-area television stations to move to Mt. Wilson despite significant short-spacings); FCC Letter dated December 13, 2000, from Clay C. Pendarvis to Pappas Telecasting of Southern California, LLC (granted waivers of UHF "taboo" spacing requirements for DTV station to permit construction of new analog facility at DTV station's authorized transmitter site atop Mt. Wilson).

[43] *See Interim Policy on VHF Television Channel Assignments*, 21 RR 1695 (1961), *recon. denied*, 21 RR 1710a (1961) ("*Interim Policy*"); *VHF Top 100 Markets*, 81 FCC 2d 233 (1980) (subsequent history omitted). Although the pending allotment requests for Channels 52-58 involve a proposed UHF allotment, rather than a VHF station, the public interest objectives set forth in these Commission decisions are equally applicable to the UHF NTSC proposals.

community with its first local television service which would promote the objectives of Section 307(b) of the Communications Act of providing a fair, efficient and equitable distribution of television broadcast stations among the various states and communities.[44] In addition, the proposed allotments would promote the second television allotment priority established in the *Sixth Report and Order* in Docket Nos. 8736 *et al., Amendment of Section 3.606 of the Commission's Rules and Regulations*, 41 FCC 148, 167 (1952), of providing each community with at least one television broadcast station.

Furthermore, as demonstrated above, the pending Channel 52-58 NTSC proposals filed by the these petitioners are part of a larger overall group of pending applications and allotment rulemaking petitions which, together, would help provide much needed assistance in fostering the development of new national networks by helping to alleviate the critical need for additional broadcast outlets. Specifically, a grant of the short-spaced allotment requests for the pending Channel 52-58 proposals would permit the allotment of a new television station in a top 100 market with which The WB or another emerging network could affiliate, and thereby make progress towards achieving national penetration and a competitive stronghold with the established networks.

In addition, a grant of the short-spacing waiver requests for the pending Channel 52-58 allotment requests would bring a new television service and new network service to a substantial number of people within the new station's service area, provide an opportunity for new entry into the television broadcast industry, promote viewpoint

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[44] 47 U.S.C. §307(b). *See National Broadcasting Co. v. U.S.*, 319 U.S. 190, 217 (1943) (describing goal of Communications Act to "secure the maximum benefits of radio to all the people of the United States"); *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358, 359-62 (1955) (describing goal of Section 307(b) to "secure local means of expression").

diversity within the designated television market,[45] and increase competition in the local advertising market. In light of the Commission's relaxation of the local television ownership rule and the increasing consolidation in the broadcast industry, the substantial public interest benefits that would result from a grant of the pending waiver requests have even more significance today than those that existed at the time the *Interim Policy* and *VHF Top 100 Markets* were adopted.

IX. Conclusion.

As demonstrated above, due to the substantial number of television stations already authorized in the Channel 52-59 spectrum band, the pending proposals for new NTSC stations would have, at most, a marginal impact upon the Commission's ability to clear the lower 700 MHz band prior to the scheduled end of the transition period. Therefore, the FCC should continue to process and grant pending NTSC proposals that will not cause interference to other television stations during the pendency of this rulemaking proceeding. Moreover, because it is becoming increasingly clear that the auction for the lower 700 MHz band is going to be delayed until 2006, the Commission's effort to expedite the clearing of the Channel 52-59 spectrum band is premature because there will be no new service licensees until the end of the transition period.

In light of these facts, it is important that the Commission give particular consideration to the significant impact that its new rules will have upon the continued development of emerging broadcast networks. The Commission should make every effort to ensure that its new rules will not further impede the prompt construction and on-air

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[45] The Commission previously has agreed with The WB that new television stations help to foster competition between networks and create opportunities for increased broadcast diversity and new entry. *See Upper 700 MHz Reallocation Order*, 12 FCC Rcd at 22971.

operation of new NTSC stations, the proposals for which have been pending before the FCC for nearly five (5) years. As demonstrated herein, the new NTSC stations would provide The WB and other emerging networks with additional broadcast outlets with which to extend their nationwide reach by acquiring additional primary affiliates in new television markets. Indeed, the proposed new NTSC stations would provide substantial public interest benefits that extend far beyond the commencement of a new television service.

Respectfully submitted,

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May 15, 2001

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day May, 2001, a copy of the foregoing COMMENTS OF THE WB TELEVISION NETWORK was hand delivered to the following:

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